

**REMARKS**

This Amendment is submitted in reply to the non-final Office Action mailed on November 17, 2008. A Petition for a three month extension of time is submitted herewith this Amendment. The Commissioner is hereby authorized to charge \$1,110.00 for the Petition for a three month extension of time and any additional fees that may be required or credit any overpayment to Deposit Account No. 02-1818. If such a withdrawal is made, please indicate the Attorney Docket No. 0112701-00707 on the account statement.

Claims 1-20 are pending in this application. In the Office Action, Claims 2-9, 11-14 and 16-20 are objected to. Claims 3-4, 9-17 and 19-20 are rejected under 35 U.S.C. §112, second paragraph. Claims 1-4 and 16-17 are rejected under 35 U.S.C. §102(b). Claims 5-15 and 18-20 are rejected under 35 U.S.C. §103(a). In response, Claims 1-6 and 8-20 have been amended and Claim 7 has been canceled without prejudice or disclaimer. The amendments do not add new matter. In view of the amendments and/or for the reasons set forth below, Applicants respectfully submit that the rejections should be withdrawn.

In the Office Action, Claims 2-9, 11-14 and 16-20 are objected to because the Patent Office alleges that, in order to have proper antecedent basis, it is advised that “in claims 2-9 and 16-19 a fat based confectionary product is changed to ‘The fat-based confectionary’ and that for claims 11-14 and 20 ‘A food product’ is changed to ‘The food product.’” See, Office Action, page 2, lines 3-7. In response, Applicants have amended Claims 2-9 and 16-19 to recite, in part, “the fat-based confectionary,” and Claims 11-14 and 20 to recite, in part, “the food product,” as suggested by the Patent Office. The amendments do not add new matter and are solely for the purpose of clarification. For at least the above-mentioned reasons, Applicants respectfully submit that the antecedent basis for the present claims is proper.

In the Office Action, Claims 3-4, 9-17 and 19-20 are rejected under 35 U.S.C. §112, second paragraph as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. With respect to Claims 3-4 and 17, the Patent Office alleges that it is not clear if the plasticizer or ingredient is part of the film coating or the confectionary product. See, Office Action, page 2, lines 16-17. In response, Applicants have amended Claims 3-4 and 17 to recite, in part, the fat-based confectionery product according to claim 1, wherein the film coating comprises a plasticizer or ingredient. The amendment does not add new matter. The amendment is supported in the Preliminary Amendment at, for

example, page 6, [0025]-[0027]. As amended, Claims 3-4 and 17 clarify that the film coating comprises the plasticizer or ingredient, not the confectionary product.

With respect to Claims 9 and 15, the Patent Office alleges that the recitation of “a method for producing [or providing] a food product” renders the scope of the claim indefinite because the only method step recited is “using” a fat-based confectionery product and that it is not clear what the “use” of the confectionery product is or what steps must be taken when “using” the confectionery product. See, Office Action, page 2, lines 18-21; page 3, lines 7-11. In response, Applicants have amended Claim 9 to recite, in part, methods comprising the steps of providing a fat-based confectionery product comprising a heat shape stable and heat resistant fat-based confectionery product. Accordingly, the skilled artisan would understand that providing the fat-based confectionery product is a step in both producing a claimed method for producing a food product to be submitted to heat. Applicants have also amended Claim 15 to recite, in part, methods for providing a food comprising the steps of combining a fat-based confectionery product comprising a heat shape stable and heat resistant fat-based confectionery product comprising a film coating having a thickness from 1 micrometer to 1 millimeter with a food product. Accordingly, the skilled artisan would understand that a food product may be produced by combining the fat-based confectionery product with a food product to provide a food. Therefore, Applicants respectfully submit that the skilled artisan would understand what steps are involved in order to practice the presently claimed invention.

Regarding Claim 10, the Patent Office states that the recitation “comprising a fat-based confectionery product, a heat shape stable and heat resistant fat-based confectionery product comprising a film” renders the claim indefinite because it is unclear if the food product comprises both a fat-based confectionery product and a heat shape stable and heat resistant fat-based confectionery product comprising a film or if the food product comprises a fat-based confectionery product that is heat shape stable and heat resistant and comprises a film. See, Office Action, page 3, lines 1-4. In response, Applicants have amended Claim 10 to recite, in part, a food product comprising a heat shape stable and heat resistant fat-based confectionery product comprising a film coating. The amendment does not add new matter and is for clarification purposes only.

With respect to Claims 15 and 16, the Patent Office also alleges that there is insufficient antecedent basis for the limitations “the coloring” and “the film forming agent” in lines 4-5,

respectively. See, Office Action, page 3, lines 12-15. In response, Applicants have amended Claim 15 to recite, in part, “a coloring” and Claim 16 to recite, in part, “a film forming agent.” The amendments do not add new matter and are solely for purposes of clarifying the antecedent basis of Claims 15 and 16.

Regarding Claim 19, the Patent Office asserts that the recitation “2 to 5% by weight” renders the claim indefinite because it is unclear what percentage of weight the film coating is being measured against. See, Office Action, page 3, lines 16-18. In response, Applicants have amended Claim 19 to recite, in part, “by weight of the coated fat-based confectionery.” The amendment does not add new matter. The amendment is supported by the Preliminary Amendment at, for example, page 7, [0033]. For at least the reasons set forth above, Applicants respectfully submit that Claims 3-4, 9-17 and 19-20 fully comply with the requirements of 35 U.S.C. §112, second paragraph.

Accordingly, Applicants respectfully request that the rejection of Claims 3-4, 9-17 and 19-20 under 35 U.S.C. §112, second paragraph, be reconsidered and withdrawn.

In the Office Action, Claims 1-4 and 16-17 are rejected under 35 U.S.C. §102(b) as being anticipated by U.S. Patent No. 4,802,924 to Woznicki et al. (“*Woznicki*”). Applicants respectfully submit that the cited references are deficient with respect to the present claims.

Currently amended independent Claims 1, 9-10 and 15 recite, in part, a film coating having a thickness from 1 micrometer to 1 millimeter. The amendments do not add new matter. The amendment is supported by the Preliminary Amendment at, for example, page 7, [0033]. Applicants have found that the presently claimed film-coated fat-based confectionery products can be dispersed into and/or scattered onto a food product such as chocolate, baked products, etc. The products do not deform when submitted to temperatures higher than ambient, the coating does not crack upon heating, and colour does not bleed from the coating into the food product. See, Preliminary Amendment, page 4, [0014]. In contrast, Applicants respectfully submit that *Woznicki* fails to disclose each and every element of the present claims.

*Woznicki* fails to disclose or suggest a film coating having a thickness from 1 micrometer to 1 millimeter, as admitted by the Patent Office. See, Office Action, page 5, lines 19-21. Instead, *Woznicki* is entirely directed toward providing a film coating on a pharmaceutical tablet, food, confectionery form and the like by coating them with polydextrose. See, *Woznicki*,

Abstract. Accordingly, *Woznicki* fails to even mention that the film coating has a certain thickness, let alone a thickness of from 1 micrometer to 1 millimeter.

Moreover, anticipation is a factual determination that “requires the presence in a single prior art disclosure of each and every element of a claimed invention.” *Lewmar Marine, Inc. v. Barient, Inc.*, 827 F.2d 744, 747 (Fed. Cir. 1987) (emphasis added). Federal Circuit decisions have repeatedly emphasized the notion that anticipation cannot be found where less than all elements of a claimed invention are set forth in a reference. See, e.g., *Transclean Corp. v. Bridgewood Services, Inc.*, 290 F.3d 1364, 1370 (Fed. Cir. 2002). As such, a reference must clearly disclose each and every limitation of the claimed invention before anticipation may be found. Because *Woznicki* fails to disclose each and every element of the present claims, as admitted by the Patent Office, *Woznicki* fails to anticipate the present claims.

Accordingly, Applicants respectfully request that the anticipation rejection of Claims 1-4 and 16-17 under 35 U.S.C. §102(b) be reconsidered and withdrawn.

In the Office Action, Claims 9-10, 13, 15 and 20 are rejected under 35 U.S.C. §103(a) as being unpatentable over “Chewy Chocolate-Chip Cookies” by Cooking Light (“*Cooking Light*”) in view of *Woznicki*. Claims 10-12 and 14 are rejected under 35 U.S.C. §103(a) as being unpatentable over “Black Forest Fudge” by Bon Appétit (“*Bon Appétit*”) in view of *Woznicki*. Applicants respectfully disagree with and traverse this rejections for at least the reasons set forth below.

Independent Claims 9, 10 and 15 have been amended to recite, in part, a film coating having a thickness from 1 micrometer to 1 millimeter. The amendments do not add new matter. The amendment is supported by the Preliminary Amendment at, for example, page 7, [0033]. As discussed above, Applicants have found that the presently claimed film-coated fat-based confectionery products can be dispersed into and/or scattered onto a food product such as chocolate, baked products, etc. The products do not deform when submitted to temperatures higher than ambient, the coating does not crack upon heating, and colour does not bleed from the coating into the food product. See, Preliminary Amendment, page 4, [0014]. In contrast, Applicants respectfully submit that the cited references fails to disclose each and every element of the present claims.

*Woznicki*, *Cooking Light*, and *Bon Appétit* all fail to disclose or suggest a film coating having a thickness from 1 micrometer to 1 millimeter as required, in part, by independent Claims

9-10 and 15. Instead, *Woznicki* is entirely directed toward providing a film coating on a pharmaceutical tablet, food, confectionery form and the like by coating them with polydextrose. See, *Woznicki*, Abstract. At no place in the disclosure does *Woznicki* suggest that a confectionery product may comprise a film coating having a thickness from 1 micrometer to 1 millimeter.

*Cooking Light* is entirely directed toward a recipe for manufacturing Chewy Chocolate-Chip Cookies. See, *Cooking Light*. The entire recipe discusses the ingredients and preparation method for producing same. See, *Cooking Light*. At no place in the disclosure does *Cooking Light* suggest that a confectionery product may comprise a film coating having a thickness from 1 micrometer to 1 millimeter. *Bon Appétit* is entirely directed toward a recipe for manufacturing Black Forest Fudge that derives its name from the popular German cake flavored with chocolate and cherries. See, *Bon Appétit*, lines 3-4. The entire recipe discusses the ingredients and preparation method for producing same. See, *Bon Appétit*. At no place in the disclosure does *Bon Appétit* suggest that a confectionery product may comprise a film coating having a thickness from 1 micrometer to 1 millimeter. Accordingly, neither *Cooking Light* nor *Bon Appétit* remedy the deficiencies of *Woznicki*.

The Patent Office alleges that the amount of film coating on the fat-based confectionery product and film thickness would have been considered a result effective variable by one of ordinary skill in the art at the time of the invention. See, Office Action, page 5, line 22-page 6, line 1. However, Applicants respectfully disagree and submit that the thickness of the film coating would be understood as providing heat stability and heat resistance to the confectionery product underlying the film coating. For at least the reasons discussed above, Applicants respectfully submit that the cited references fail to disclose each and every element of the present claims.

Accordingly, Applicants respectfully request that the rejection of Claims 5-15 and 18-20 under 35 U.S.C. §103(a) be reconsidered and withdrawn.

In the Office Action, Claims 6-8 and 18-19 are rejected under 35 U.S.C. §103(a) as being unpatentable over *Woznicki*. Claim 5 is rejected under 35 U.S.C. §103(a) as being unpatentable over *Woznicki* in view of U.S. Patent No. 6,274,162 to Steffenino et al. ("Steffenino"). Applicants respectfully submit that the patentability of independent Claim 1 as previously discussed renders moot the obviousness rejection of Claims 5-8 and 18-19 that depend from

Claim 1. In this regard, the cited art fails to teach or suggest the elements of Claims 5-8 and 18-19 in combination with the novel elements of Claim 1.

For the foregoing reasons, Applicants respectfully request reconsideration of the above-identified patent application and earnestly solicit an early allowance of same. In the event there remains any impediment to allowance of the claims that could be clarified in a telephonic interview, the Examiner is respectfully requested to initiate such an interview with the undersigned.

Respectfully submitted,

K&L GATES LLP

BY 

Robert M. Barrett  
Reg. No. 30,142  
Customer No.: 29157  
Phone No. 312-807-4204

Dated: April 21, 2009